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## The Federalization of Banking— Due-On-Sales, A Case in Point

JOELLEN MITCHELL-LOCKYER\*

The delivery of financial services has been revolutionized in this generation by economic, technological, and demographic changes putting steady and effective pressure on the legal structure that shores up the dual state and federal system of banking.<sup>1</sup> Over time, these

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This Article is the companion piece to the author's treatment of *Fidelity Federal Savings and Loan Association v. Reginald de la Cuesta*, 102 S.Ct. 3014, (1982, [hereinafter referred to as "*de la Cuesta*"]) appearing in 14 PAC. L.J. 1 (1982). In *de la Cuesta* the United States Supreme Court held that a 1976 regulation of the Federal Home Loan Bank Board [hereinafter referred to as the FHLBB] had preempted California state policy prohibiting lender acceleration of real property loan obligations on transfer (the so called "due-on-sale" controversy), at least insofar as lenders with a federal aspect were involved. See Mitchell-Lockyer, *De la Cuesta; Federal Determination of Contract and Property Rights?*, 14 PAC. L.J. 1 (1982).

1. See generally, Wall St. J., Feb. 12, 1982, at 22, col. 1; Feb. 17, 1982, at 22, col. 1; Feb. 22, 1982, at 22, col. 1; Mar. 1, 1982, at 22, col. 1; Mar. 4, 1982, at 24, col. 1; Mar. 9, 1982, at 24, col. 1 (a multi-part treatment analyzing banking deregulation); HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97th Cong., 1st Sess., FINANCIAL INSTITUTIONS IN A REVOLUTIONARY ERA (Comm. Print 1981); THE DEREGULATION OF THE BANKING AND

forces have created a system of financial practices and institutions that is truly national in character, notwithstanding its form de jure. The history of banking in America demonstrates the hostility of citizens to the concentrated political power that a centralized federal struc-

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SECURITIES INDUSTRIES (L. Goldberg & L. White eds. 1979); *Mutual Fund Assets Soared in 1981, Powered by Money Market Funds*, (Jan.-June) WASH. FIN. REP. (BNA) no. 1, at A-13 to -14 (Jan. 4, 1982).

See Daniel, Longbrake & Murphy, *The Effect of Technology on Bank Economic of Scale for Demand Deposits*, 28 J. FIN. 131 (1973), for several fascinating articles on the significance of computerization to the banking industry. See also, Longbrake, *Computers and the Cost of Producing Banking Services: Planning and Control Considerations*, J. BANKING RESEARCH, (Autumn 1973). See Breeden, *Federal Regulation of Financial Services: Time for a Change*, 30 FED. BAR & NEWS J. 316-19 (1983) for a discussion by the Deputy Counsel to the Vice President and Staff Director of the Administration's Task Group on the Regulation of Financial Services [hereinafter referred to as Task Group]. The Task Group was established in 1982 by the Administration and is comprised of Vice President Bush, the Secretary of the Treasury, the Attorney General, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, the Assistant to the President for Policy Development, the Chairmen of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the FHLBB, the National Credit Union Administration Board, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, as well as the Comptroller of the Currency. *Id.* at 319.

Throughout this article the term "banking" is used generically to refer to the activities of federally or state chartered commercial banks, savings and loan (or thrift) associations, mutual savings banks and, to a lesser extent credit unions. These entities form a major subcategory of all institutions providing financial services and are also referred to generally as "depository" institutions. These depository institutions obtain funds from the receipt of money deposits. They should be distinguished from non-depository institutions providing financial services such as mutual funds, money market mutual funds, life and property insurance companies, and pension funds. These entities gain funds from premiums, investment earnings, and other non-deposits categories. HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 97th Cong., 1st Sess., A REFERENCE GUIDE TO BANKING AND FINANCE 19 (Comm. Print 1981) [hereinafter referred to as REFERENCE GUIDE].

Commercial banks accept demand deposits, i.e., deposits that the depositor has a legal right to withdraw on demand, and also engage in a wide range of commercial loan activities. See The Bank Holding Company Act of 1956, as amended [hereinafter referred to as the BHC] 12 U.S.C. §§1841-1850; see also, a REFERENCE GUIDE, *supra*, at 8. Commercial banks can be chartered by the federal government or by a state. National banks are subjected to the initial control of the Comptroller of the Currency by the National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified in various sections of 12, 19 and 31 U.S.C.) [hereinafter referred to as the National Bank Act]. See *infra* notes 41-51 and accompanying text. National banks are also members of the Federal Reserve System [hereinafter referred to as the FRB] a national clearing system for checks and other instruments created in 1913 by the Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (codified in various sections of 12 and 31 U.S.C.) [hereinafter referred to as the Federal Reserve Act]. Deposits in national banks are also insured by the Federal Deposit Insurance Corporation [hereinafter referred to as the FDIC] a federal organization created during the Depression and in response to the losses of depositors in uninsured banks. See the Federal Reserve Act of 1933, ch. 89, 48 Stat. 168 (adding section 12B to the Federal Reserve Act). Provisions pertaining to the FDIC are now codified in 12 U.S.C. §§1811-1832. As a result, national banks are subject to the overlapping regulatory jurisdiction of at least three federal agencies, the Comptroller, the FRB, and the FDIC. See Breeden, *supra*, at 319; Hackley, *Our Baffling Banking System* (pt. 1), 52 VA. L. REV., 565, 567 (1966). State chartered banks may belong to the FDIC as well. See 12 U.S.C. §§1814(b), 1815.

Savings and loan associations (thrifts) are also chartered either by the federal or state governments. These entities are depository institutions in that they receive deposits, but they are more restricted in their investment activities than commercial banks, being allowed to invest generally

ture was thought to produce,<sup>2</sup> however, modern market pressures have made local control and state dominance obsolete concepts and the system of combined federal and state regulation a burden to be avoided at almost any cost.

As the substructure of the banking legal apparatus has undergone fundamental change, critics of the existing framework have called for a fundamental reform of banking controls.<sup>3</sup> Congress and regulatory agencies have responded, but in a reactive and piecemeal fashion. Instead of directly excluding states from the area of banking regulation by establishing a unified federal structure for banking regulation, Congress has retained the form of the dual system while gradually subverting its function through passage of piecemeal legislation that has become national in character.<sup>4</sup> The Garn-St. Germain Depository

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only in home mortgages and federal government securities. Cf. *infra* notes 85-111 and accompanying text. The FHLBB regulates federally chartered associations. Federal Home Loan Bank Act, 12 U.S.C. §§1421-1449. See also KENDALL, *THE SAVINGS AND LOAN BUSINESS: ITS PURPOSES, FUNCTIONS AND ECONOMIC JUSTIFICATION* (1962); Mitchell-Lockyer, *supra*, at 5-12. Recently, the functions of savings and loan associations have been dramatically expanded so that they more resemble commercial banks. See *infra* notes 85-111 and accompanying text. Moreover the rate differential between the amount of interest such associations can pay depositors compared to that allowed for commercial banks is being phased out pursuant to federal legislation. See *infra* notes 91, 108 and accompanying text.

Credit unions are also depository institutions. They are cooperatives in which deposits are pooled. Membership in them is restricted so that only specified classes of persons may make deposits. For this reason, they have not been viewed as having a significant competitive advantage over other depository institutions and the amount of interest they can pay out to their depositors is not controlled by the federal government. The National Credit Union Administration regulates federal credit unions pursuant to the Federal Credit Union Act, 12 U.S.C. §§1751-1795. The effect on credit unions of modern trends in banking is not the primary focus of this article, although credit unions have benefitted from the federal authorization of special deposit accounts designed to compete with money market funds and other aspects of deregulation. See *infra* notes 85-111 and accompanying text.

Commercial banks, directly, and thrift association, as an incident of their limited powers, have been prevented from engaging in investment activities. Non-depository institutions participating in investment activities have provided intense competition for "banking" institutions. They participate in mutual funds, bond funds, and money market funds. These entities offer shares in pooled funds and then manage the funds by buying investment securities. They are regulated by the securities laws (and agencies created pursuant thereto) of the state and/or federal governments. P. ROSE & D. FRASER, *FINANCIAL INSTITUTIONS* 400-03 (1980).

2. See generally NORTON & WHITLEY, *BANKING LAW MANUAL* chs. 2 & 3 (1981); R. TIMBERLAKE, *THE ORIGINS OF CENTRAL BANKING IN THE UNITED STATES* (1978); BURNS, *THE VINEYARD OF LIBERTY* (1982); Englert, *Bank Supervision in Historical Perspective*, 34 BUS. LAW. 1659 (1979).

3. See Englert, *supra* note 2, at 1659-62; Breeden, *supra* note 1, at 319-22; Driskill, *The Reality of Interstate Banking*, 122 TRUSTS & ESTATES 12, 15 (June, 1983); La Falce, *Banking in the Eighties*, 37 BUS. LAW. 839, 839 (1982). Mr. La Falce is a member of the House of Representatives, 36th District, New York and has sponsored various pieces of legislation dealing with the banking industry. *Id.*

4. See Breeden, *supra* note 1, *passim*; La Falce, *supra* note 3, *passim*; Raven, *Banks Near Banks and Almost Banks—Expanding Competition Blurs Traditional Distinction Among Financial Institutions*, 50 A.B.A. ANTITRUST L.J. 389 (1981).

Institutions Act of 1982<sup>5</sup> is the latest, and perhaps the last, statutory scheme designed to result in patchwork reforms of the existing system.

The Garn Act is a massive, omnibus bill primarily directed to failing thrift institutions and responsive to the clamor for deregulation of banking functions.<sup>6</sup> Included within the bill is a provision preempting state policy on the exercise of due-on-sale clauses in mortgage and similar real property lending instruments.<sup>7</sup> The Act thus curtails the freedom of states to govern certain contract and property rights that historically have been considered within the sphere of state power. The immediate impact of the Garn Act is softened, however, by sections dealing with the implementation of the due-on-sale provisions. First, the statute creates a "window period" that allows contrary state due-on-sale policy to apply to loans made during a time period prior to Garn.<sup>8</sup> Second, the Garn Act gives the states a three year grace period within which to reject the federal philosophy and retain the law of the state on due-on-sale clauses for window loans.<sup>9</sup> The Act grants states the window and gives them a method to throw off the federal mandate for a limited category of pre-Garn loans, reflecting Congressional concern for the state and federal conflicts in power that the banking system historically has generated. Less than one year after Garn, however, the Federal Home Loan Bank Board (hereinafter referred to as FHLBB) has issued regulations pursuant to the Act that limit the ability of states to apply their own due-on-sale policy even for window loans. The FHLBB may therefore oust the states from *any* control over due-on-sale acceleration, even control based on fundamental equitable principles other than restraint on alienation.<sup>10</sup>

The constitutional underpinnings of the Garn Act due-on-sale provisions also have presented interesting questions.<sup>11</sup> Moreover, the methods used in the Act to finesse the constitutional and policy considerations deserve scrutiny.<sup>12</sup> In California, however, consumers and

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5. Pub. L. No. 97-320, 96 Stat. 14 (1982) (codified in various sections of 12 U.S.C.).

6. See generally Norton, *The 1982 Banking Act and the Deregulation Scheme*, 38 Bus. LAW. 1627 (1983).

7. 12 U.S.C. §341 (1982).

8. *Id.* §341(c).

9. *Id.*

10. 12 C.F.R. 545, 556, 590, 591. These rules/regulations were finally adopted on April 26, 1983.

11. See Mitchell-Lockyer, *supra* note 1, at 23-25 *passim*.

12. For instance, the federal direction that a state's policy toward "window loans" can only be legislatively determined might conceivably raise the complex of issues suggested by *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976) and *Hodel v. Indiana*, 452 U.S. 314, 314 (1980) concerning the ability of the 10th Amendment of the United States Constitution to block the exertion of federal power validly exercised pursuant to the Commerce Clause.

realtors have been forced to give up the fight to preserve state regulatory power and instead they have concentrated on implementing Garn in the most liberal fashion by seeking state legislation that would broadly define the window period. Even this modest effort to retain some state control has been rendered futile by the recent appearance of the FHLBB rules and regulations.<sup>13</sup> Opponents of the FHLBB action could argue that the new regulations go far beyond the delegation of congressional power to the agency in Garn and that these regulations are therefore constitutionally infirm.<sup>14</sup> Nonetheless, it appears that the California proponents of restrictions on lender acceleration have finally given up their long struggle and lack the will or the capacity to fight the federal agency for the few crumbs of state power left after the Garn Act, at least in the state legislative arena.<sup>15</sup> The purpose of this article is to describe the recent history of the due-on-sale controversy in California against the backdrop of evolution in the banking system. Understanding the potency of market forces and the fundamental changes in the banking system yields a clue as to why the state interest in local regulation of contract and property rights emanating from loan transactions, though legitimate, ultimately was doomed to federal domination.

#### A SHORT HISTORY OF BANKING REGULATION

The basic product of any financial institution is money. Various methods of regulating the "sale" of money have been used to control and curb the power of banks. The regulations primarily have focused on four general areas: (1) the price of the product (limits on interest rates),<sup>16</sup> (2) the amount sold (reserve require-

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See also Mitchell-Lockyer, *supra* note 1, at n. 18. The modern utility of this 10th Amendment argument has been drastically limited by discussion like that which occurred in *Federal Energy Regulatory Comm'n v. Mississippi*, 102 S.Ct. 2126 (1982) and *Equal Employment Opportunity Commission v. Wyoming*, 103 S.Ct. 1054 (1983).

13. See S.B. 494, 1983-84 Regular Session (in its original form, as introduced on February 22, 1983); see also *infra* notes 139-75 and accompanying text. On May 9, 1983, approximately two weeks after the FHLBB issued its rules, S.B. 494 was gutted and transformed into a new bill dealing with the limited problem of pre-payment penalties for acceleration in the context of due-on-sales. See *infra* notes 145-75 and accompanying text.

14. See generally *infra* note 167 and accompanying text.

15. See *infra* notes 139-75 and accompanying text.

16. Regulation of interest rates charged for the sale of money has been achieved by state prohibitions on usury or other state legislation limiting rates in particular transactions. See Raven, *supra* note 4, at 396. See, e.g., CAL. CONST. art 15, §1; Retail Installment Sales Act ("Unruh Act") CAL. CIV. CODE §§1801, 1805.1; A.B. 1858, 1983-84 Regular Session. Determination of the amount of interest that lenders regulated by the FRB, and the FHLBB can pay depositors has been effectuated by Regulation Q, \_\_\_\_ C.F.R. . Rates are fixed there on the basis of deposit maturity and size. Moreover, the dominant purpose of the scheme set up by Regulation Q is to equalize the competitive advantages among various forms of financial

ments),<sup>17</sup> (3) the methods and form of sale (restrictions on banking functions),<sup>18</sup> and (4) the place of sale (prohibition on interstate banking).<sup>19</sup> These forms of product regulation have not been the only

institutions (e.g. banks versus thrifts). See Raven, *supra* note 4, at 393. See also, *Banks and Banking in the United States*, 1 FED. BANKING L. REP. (CCH) §1001 et. seq. (1979). See *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 131 (1969) and *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) for a discussion of the allocation of regulatory power between the various federal agencies (espousing the doctrine of equality in competition between depository institutions. Most financial institutions subject to regulation are regulated by the FRB, the FDIC, FHLBB or the Federal Savings and Loan Insurance Corporation [hereinafter referred to as the FSLIC]. See 48 Stat. 1255 (1933) (codified today in 12 U.S.C. §§1724-30f). See generally, REFERENCE GUIDE, *supra* note 1, at 19.

Deregulation of interest rates charged and paid out is an ongoing process. The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat 132 (1980) (codified in various parts of 12, 15, and 42 U.S.C.) [hereinafter referred to as the Monetary Act of 1980] (both pre-empts state law restricting interest rates in various ways, and provides for the orderly phase out of federal restrictions contained in Regulation Q). See, Raven, *supra* note 4, at 397-98; La Falce, *supra* note 3, at 851-52; Norton, *supra* note 6, at 1628-29; Cairns, *Retail and Wholesale Banking: Diverging Markets and Lines of Commerce*, 32 SYRACUSE L. REV. 713, 726-28 (1981). See generally Cox, *Regulation of Interest on Deposits: An Historical Review*, 22 J. FIN. 274 (1967). See 1980 U.S. CODE CONG. & AD. NEWS 236 for the legislative history of the Monetary Act; Weaver & O'Malley, *The Depository Institutions Deregulation and Monetary Control Act of 1980: An Overview*, 98 BANKING L.J. 100, 101-02 (1981).

To effectuate deregulation of rates called for in the Monetary Act, Congress established the Depository Institutions Deregulation Committee [hereinafter referred to as DIDC]. See 12 U.S.C. §§3502-3503. The work of DIDC has been controversial. See, e.g., *Carter Administration Urges DIDC to Forego Adoption of Plan*, *American Banker*, July 18, 1980, at 1, col. 3.

17. The Monetary Act of 1980 actually increased some aspects of regulation by extending reserve requirements to all financial institutions, including non-FRB member state banks, thrifts and credit unions. See 12 U.S.C. §461(b). This is just one example of the federalization of banking and the continual encroachment on state power. The move was justified as "important for monetary policy" so that the power "needs to be controlled by the nation's central bank [the FRB]." See 2 U.S. CODE CONG. & AD. NEWS 236, 249, 96th Congress 2d Sess. (1980).

The Garn Act, however, liberalizes the despository restrictions relevant to all financial institutions. See Additional Views on S. 2879, S. Rep. No. 536, 97th Cong. 2d Sess. (Sept. 3, 1982).

18. See the Omnibus Banking Act of 1933, ch. 89, 48 Stat. 162 (1933) (codified in various sections of 12, 18 U.S.C.) [hereinafter referred to by its popular name "Glass-Steagall"]. Glass-Steagall was passed in response to the Depression and restricted banks from investment activities. See Securities Industry Association, *Public Policy Issues Raised by Bank Securities Activities*, 20 SAN DIEGO L. REV. 339, 344-52 (1983); Dunn, *Expansion of National Bank Powers: Regulatory and Judicial Precedent Under the National Bank Act, Glass-Steagall Act and, Bank Holding Company Act*, 36 SW. L.J. 765, 779-80 (1982); Yesley, *Defining the Product Market in Commercial Banking*, FED. RES. BANK OF CLEV. ECON. REV. 17 (June-July 1972); La Falce, *supra* note 3, at 844-48; Breeden, *supra* note 1, at 316; Report of the Sixty Fourth American Assembly, Columbia University, *The Future of American Financial Service Institutions* (April 7-10, 1983).

Aside from prohibiting "banks" from investment activities, state and federal regulations have historically limited the relative functions of banks and thrifts. Banks and thrifts are chartered separately. See, e.g., 12 U.S.C. §1464(a)(1). In addition, banks and thrifts are regulated by different agencies. The National Bank Act and the Federal Home Loan Bank Act, 12 U.S.C. §§1421-1449 (1976 & Supp. IV 1980) [hereinafter referred to as HOLA]. See generally REFERENCE GUIDE, *supra* note 1, at 8; Hackley, *supra* note 1, at 567.

Both banks and thrift associations have used the device of holding companies to avoid the statutory restrictions on their activities and relative spheres of influence. See BHC, *supra* note 1, §§1841-1850. See also the Savings and Loan Holding Company Act, 12 U.S.C. §1724, 1730(a).

19. See 12 U.S.C. §36; see also Driskell, *supra* note 3, at 1213.

devices used to retard the concentration of money and power that occurs in a centralized national banking system. The checks and balances present in the state and federal regulatory system have inhibited the development of a truly national system for delivering financial services.<sup>20</sup> Currently, legislative support for an archaic system premised on local control is rapidly diminishing.<sup>21</sup> The shift in mood coincides with competitive pressures in the marketplace driving financial institutions to offer more varied services in larger geographic areas.<sup>22</sup> The history of the American dualistic banking system reveals, however, that the public perception and economic climate generating the creation of the system have changed drastically over time.

The issue of whether the federal government should establish a national bank was one of the most controversial points of disagreement between the Federalists and the proponents of states' rights in the post-Revolutionary period.<sup>23</sup> Soon after the establishment of a national government, Secretary of the Treasury Alexander Hamilton proposed the creation of a central bank for production of a national currency and promotion of a uniform monetary policy.<sup>24</sup> The anti-Federalists were adamantly opposed to the creation of the Bank, and the conflict created a significant constitutional crisis during

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20. See Breeden, *supra* note 1, at 318-19; La Falce, *supra* note 3, at 846-54; see also, Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 1-3 (1977).

21. See Breeden, *supra* note 1, at 319 (describing the work of the Task Force); see also, Geographic Restrictions on Commercial Banking in the United States, Report of the President, Department of the Treasury (1981).

22. See generally *supra* note 1 and accompanying text. Congressman St. Germaine, *Financial Institutions: A Decade of Revolution*, 28 FED BAR NEW J. 97 (1981); Raven, *supra* note 4, at 390-91. A highly mobile citizenry and technological innovations such as electronic fund transfers also have contributed to the explosion of the banking industry. See Consumer Credit Protection Act, Electronic Fund Transfers, 15 U.S.C. §1693; see also Driskill, *supra* note 3, at 13-15; Wall St. J., July 16, 1981, at 1, col. 5.

23. During the Revolutionary War, however, the Bank of North America was created by the Second Continental Congress to provide general monetary aid from a central source. The Bank later accepted a Pennsylvania charter and no longer retained the legal form necessary to continue its national character in the post-revolutionary period. See 2 ANNALS OF CONGRESS (Gales & Seaton eds. 1790) [hereinafter referred to as 2 Annals]; see also Englert, *supra* note 2, at 1662-63; Hackley, *supra* note 1, at 569. HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 144-450 (1957); Englert, *supra* note 2, at 1663-64 (for a general discussion of the early controversy); Task Force Regulatory Commission, Report Prepared for the Commission on Organization of the Executive Branch of Government (1949); Via, *Some Thoughts on Evaluating the Tripartite Federal Bank Regulatory Scheme*, 93 BANKING L.J. 509, 509-10 (1976), Hackley, *Our Discriminating Banking Structure*, 55 VA. L. REV. 1421, 1429-32 (1969) [hereinafter referred to as Hackley II].

24. See generally NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 123-28 (1983) [hereinafter referred to as NOWAK]. Hamilton unveiled his position on the national bank question in a report submitted to Congress on September 14, 1790 which is well known as his "Report on the National Bank". See 2 ANNALS, *supra* note 23, at 2083-86.



Washington's administration.<sup>25</sup> The conflict was resolved when the Federalists prevailed and established the first National Bank,<sup>26</sup> although the new Bank was not successful and its charter was allowed to expire in 1811.<sup>27</sup> By this time, the Federalists had been ousted from power and the subsequent administration had little interest in reviving a national bank.<sup>28</sup>

The War of 1812 quickly changed the political scene in America and in the aftermath, the individual states were unable to promulgate a workable monetary policy. In 1816, President James Madison, although anti-Federalist, authorized the creation of the second National Bank.<sup>29</sup> Soon afterwards, however, a widespread economic depression hit the country and the Bank seemed ineffective in stopping the downward turn in the economy.<sup>30</sup> More importantly, the manner in which the Bank conducted business confirmed the worst fears of the Jeffersonians and other anti-Federalists who equated national banking with anti-democratic concentrations of political power in the hands of the propertied few. Branches of the Bank appeared to be run in a corrupt manner with special privileges doled out to special interest groups.<sup>31</sup> Many states responded with attempts to limit the power of the Bank.<sup>32</sup> This conflict between state and federal power over the second National Bank led to the famous case of *McCulloch v. Maryland*,<sup>33</sup> which has primary importance today for the Supreme Court's interpretation of the necessary and proper clause of the Constitution.<sup>34</sup>

In *McCulloch*, the power of the federal government to establish a national bank was upheld in the context of a controversy concerning a Maryland tax on bank notes.<sup>35</sup> The decision was instrumental in promoting an important basis for exertions of federal power,<sup>36</sup>

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25. See NOWAK, *supra* note 24, at 123; TRIBE, AMERICAN CONSTITUTIONAL LAW §5-3 (1978).

26. 1 Stat. 192 (1791); see also TRIBE, *supra* note 25, at §5-3.

27. See Englert, *supra* note 2, at 1664.

28. See NOWAK, *supra* note 24, at 125.

29. See DUNNE, MONETARY DECISIONS OF THE SUPREME COURT 25, 27 (1960).

30. See NOWAK, *supra* note 24, at 125.

31. *Id.*

32. *Id.*

33. 17 U.S. (4 Wheat.) 316 (1819). Prior to the Civil War, federal legislation was invalidated only in *Marbury v. Madison*, 5 U.S. 137 (1803) and *Dred Scott v. Sanford*, 60 U.S. 393 (1857). See also *Osborn v. Bank of United States* (9 Wheat.) 738 (1824).

34. See 1 C. WARREN, THE SUPREME COURT IN THE UNITED STATES 500 (Rev. ed. 1926); see also, Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955) (in which Frankfurter discussed the extreme importance of *McCulloch* for the development of federal power).

35. See *McCulloch v. Maryland*, 17 U.S. 316, 319 (1819).

36. See Frankfurter, *supra* note 34, at 219.

however, the political climate became hostile to the Bank and the election of Andrew Jackson to the Presidency engendered a struggle over the status of the National Bank.<sup>37</sup> Jackson vetoed the bill to renew the charter of the Bank and the resulting congressional conflict was unproductive. The charter of the second National Bank expired in 1836.<sup>38</sup> From 1836 until 1863 "free banking" prevailed in this country.<sup>39</sup> No significant federal control of banking occurred and all who wished to embark on the business of banking could do so with little limitation. Currency was not controlled by the federal government and private banks were allowed to issue their own notes. As a result, a large number of different currencies were put into circulation. The problem was exacerbated by the constitutional prohibition that precludes states from coining money and issuing bills of credit.<sup>40</sup>

Prior to the outbreak of the Civil War, the banking "system" in this country was unregulated by the federal government and remained highly local in character.<sup>41</sup> Just as the War of 1812 created an earlier economic necessity for the second National Bank, the Civil War provided the impetus for the seed of our current banking structure. In 1864 Congress passed the National Bank Act<sup>42</sup> to insure a stable source and a uniform character of money to finance the Union war effort.<sup>43</sup> Congress had learned from the prior experience with the second National Bank, and this time created an apparatus that allowed private persons to form "national banking associations" pursuant to federal charter, subject to regulation through the office of the Comptroller of the Currency.<sup>44</sup> Moreover, sensitive to the popular suspicion of a federal system of banking, the National Bank Act made federally chartered banks subject to state law in a variety of ways.<sup>45</sup> Finally, the activities of institutions chartered pursuant to the Act were

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37. See generally JAMES, *THE LIFE OF ANDREW JACKSON*; Englert, *supra* note 2, at 1665-66.

38. See Englert, *supra* note 2, 1665-66; Hackley, *supra* note 1, at 570-71.

39. See Englert, *supra* note 2, at 1666; Hackley, *supra* note 1, at 570-71.

40. See Englert, *supra* note 2, at 1666-67; Hackley, *supra* note 1, at 570-71.

41. See generally, *TIMBERLAKE*, *supra* note 2, at \_\_\_\_.

42. See *supra* note 1 and accompanying text.

43. *Id.*

44. 12 U.S.C. §21 (1976); see also 12 U.S.C. §§26-27; see also Hackley II, *supra* note 23, at 1436-43. See generally Dunn, *supra* note 18, at 768-70; R. ROBERTSON, *THE COMPTROLLER AND BANK SUPERVISION: A HISTORICAL APPRAISAL* \_\_\_\_ (1968).

45. See, e.g., 12 U.S.C. §85 (subjecting nationally chartered lenders to state restrictions on interest rates charged borrowers). But see the Monetary Act's preemption of state Monetary Act, discussed *infra* note 85 and accompanying text. See also 12 U.S.C. §36 (1976) (restricts national banks to state law on branching). Most importantly, contract and property rights of persons dealing with federally chartered banks and savings and loans was thought to be a matter of state law, at least until the appearance of *de la Cuesta*. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Butner v. United States*, 440 U.S. 48, 55 (1979); cf. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479-83 (1973).

restricted to the "business of banking."<sup>46</sup> The result of the National Bank Act was to create a system of privately owned, federally chartered banks alongside the existing state banking structure. Thus, the dualistic character of the apparatus was formed.

Soon after passage of the National Bank Act, litigation ensued concerning the scope of the business of banking restriction.<sup>47</sup> Most of the court decisions concerned the relationship of the incidental powers clause of the Act with this restriction.<sup>48</sup> The incidental powers provision granted to the federally chartered banks the right to carry on activities that were supplemental to the business of banking, when necessary.<sup>49</sup> Judicial response to the clause has been characterized as liberal.<sup>50</sup> Through interpretation of the incidental powers clause, the activities of national banks gradually expanded.<sup>51</sup> Again, however, economic forces worked a change in judicial and congressional attitudes and spawned landmark legislation affecting the entire federal and state banking structure. Both the Supreme Court and the Congress responded to the crisis of the Great Depression and the result was a restriction on the activities of national banks and a phenomenal increase in the amount and sources of regulation.

In *Texas & Pacific Railway Co. v. Pottorff*,<sup>52</sup> the Supreme Court held that a proper interpretation of the incidental powers clause prohibited a bank from pledging its own assets to secure a depositor's account, notwithstanding the convenience of the activity for the bank. In reaching this result, the Court looked to the common practices of most banks in addition to the risk to depositors. While the effect of *Pottorff* was to narrow the scope of banking activity conducted by federally chartered institutions, the method of analysis was similar to that used in other cases. An important factor in the decision was the *actual* activity of banks with regard to the banking function at issue. This approach of looking at de facto patterns of business to determine whether activities should be authorized de jure is a com-

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46. 12 U.S.C. §21 (1976).

47. See generally Dunn, *supra* note 18, at 768-70.

48. See, e.g., *First National Bank v. National Exchange Bank*, 92 U.S. 122, 126-29 (1875) (construing the "incidental powers clause"); see also, *First National Bank v. City of Hartford* 273 U.S. 548, 550-61 (1927) (determining the proprietary of a national bank's purchase and sale of real estate mortgages).

49. See Dunn, *supra* note 18, at 768-69.

50. *Id.*

51. *Id.*

52. 291 U.S. 245 (1934); see also *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 438 (1st Cir. 1972).

mon theme in banking regulation, both from a judicial and legislative perspective.<sup>53</sup>

Modern banking regulatory agencies also were born in the Depression.<sup>54</sup> The Federal Reserve Board (hereinafter referred to as FRB) had been created in 1913 to coordinate the numerous individual banks.<sup>55</sup> State banks were allowed to become members of the FRB system, but their membership subjected them to regulation by the FRB. In 1933 and again in 1935, the functions of the FRB were expanded and the regulatory activities of the Board were increased.<sup>56</sup>

Congress also responded to the crisis in the thrift industry. The FHLBB was created and soon thereafter, the Home Owners Loan Act of 1933 (hereinafter referred to as HOLA) was enacted to establish a federal system of savings and loan associations. The federal system supplemented a state system of associations in poor condition due to the rash of home foreclosures spawned by the Depression.<sup>57</sup> In response to bank failures, the Federal Deposit Insurance Corporation (hereinafter referred to as FDIC) also was established to insure depositor's funds on account.<sup>58</sup> State banks could become members of the FDIC system but, once again, with membership came regulation. The Federal Savings and Loan Insurance Corporation (hereinafter referred to as FSLIC) functioned similarly for thrifts.<sup>59</sup> The effect of these new agencies was an interconnection of the state and federal banking systems and the subjugation of many state institutions to national regulation in exchange for membership in federal organizations like the FRB and the FDIC.

During the Depression, Congress also sought to limit further the methods and forms of the "sale" of money by banks. In 1933, the Glass-Steagall Act was passed, plugging a particularly attractive loophole by restricting banks from participating in investment activities.<sup>60</sup> Banks already had been prohibited from many other func-

53. See Dunn, *supra* note 18 at 768-70.

54. See generally *de la Cuesta* 102 S. Ct. at 3025; *Laurens Federal Savings and Loan Ass'n v. South Carolina Tax Commission*, 365 U.S. 517, 521-22 (1980); Englert, *supra* note 2, at 1671-72; Breeden, *supra* note 1, at 316-18.

55. See The Federal Reserve Act, *supra* note 1, §§221-522; see also Breeden, *supra* note 1, at 316-17; Malcolm, *How Bank Collection Works - Article 4 of the Uniform Commercial Code*, 11 How. L.J. 71, 71-77 (1965).

56. See Hackley II, *supra* note 23, at 1422.

57. See *de la Cuesta*, 102 S.Ct. at 3025-29; Mitchell-Lockyer, *supra* note 1, at 6-7.

58. 48 Stat. 168 (1933).

59. FSLIC, *supra* note 1. See generally Hackley, *supra* note 1, at 577-78.

60. See generally the Glass-Steagall Act, *supra* note 18; *White Paper*, *supra* note 18, at

tions by judicial construction of the "business of banking" limitation in the Banking Act.<sup>61</sup> Like banks, federal thrift associations also were limited in their activities because the primary function of the associations was viewed as providing loan funds to finance the purchase of real property.<sup>62</sup> Finally, the National Bank Act already had subjected national banks to the branching restrictions of the state in which the bank was located, inhibiting interstate banking as a result.<sup>63</sup>

By the end of the 1930's, the banking "system" in this country, consequently, was characterized by a federal and state structure of institutions, subject to differing sources of primary regulation, but interlocked to some extent by regulatory overlap.<sup>64</sup> In addition, two major types of institutions were allowed in both the state and federal arenas—"banks" and "thrifts"—each with restricted functions and separate spheres of operation in the financial market. The local character of the whole system was preserved, first by the dualistic nature, then by geographic restrictions, and finally by subjecting federally chartered entities to state law on some subjects.<sup>65</sup> At the time, this complex and interwoven pattern seemed to serve the needs of a populace that was not particularly mobile and an economy that was recovering from the Depression.

Economic boom and the vast demographic upheaval that the Second World War wrought, made great changes in the financial marketplace but the system was very slow to respond. The post-War world signalled the appearance of factors that today make the establishment of a truly national system of banking inevitable. After the Second World War, the non-bank financial intermediaries began to compete successfully with banks and other institutions for the available money supply.<sup>66</sup> The banking community fought back by aggressively attempting to re-establish a broad interpretation of the

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344-47; Farrar, *Commercial Banks, Trust Departments, and Concentration of Power: A Legacy of Glass-Steagall*, 4 J. COMP. CORP. L. & SEC. REG. 237, 237-38 (1982).

61. See Dunn, *supra* note 18, at 768-70; see also *supra* notes 47-51 and accompanying text.

62. See, e.g., 12 U.S.C. §36.

63. See Hackley, *supra* note 1, at 565-78; Breeden, *supra* note 1, at 316-17; Raven, *supra* note 4, at 392.

64. Breeden, *supra* note 1, at 316-17.

65. Mortgage and property rights have been generally deemed to be within the power of the states. See, e.g., *Butner v. United States*, 440 U.S. 48, 55 (1979). Moreover, some courts have treated thrift associations as being subject to state law in the conduct of their external affairs. See *Holiday Shores No. 3 v. Midwestern Federal Savings and Loan Ass'n.*, 308 N.W.2d 471, 478 (Minn. 1981); *Gulf Federal Savings and Loan Ass'n. of Jefferson Parish v. Federal Home Loan Bank Board*, 651 F.2d 259, 266 (5th Cir. 1981). The *de la Cuesta* decision provided a striking blow to historic state prerogatives in these areas. See generally Mitchell-Lockyer, *supra* note 1.

66. See generally Hackley, *supra* note 1, at 771-82; Dunn, *supra* note 18, at 770.

incidental powers clause of the National Bank Act.<sup>67</sup> In a series of clashes with various interest groups, banks sought to sell insurance,<sup>68</sup> to conduct travel agency businesses,<sup>69</sup> to act as couriers,<sup>70</sup> and to provide non-bank data processing services to the general public.<sup>71</sup> With the exception of the right to engage in personal property leasing,<sup>72</sup> the Supreme Court and various federal appellate courts generally invalidated Comptroller rulings allowing these expanded activities.<sup>73</sup>

After the war, banks and savings and loan associations each began to look at the activities of the other to find ways to perform prohibited functions.<sup>74</sup> Banks were particularly attracted to the range of real property activities undertaken and to the tax advantages enjoyed

67. See Dunn, *supra* note 18, at 770-76; Robertson, *supra* note 44, at 158.

68. See *Saxon v. Georgia Association of Independent Insurance Agents, Inc.*, 268 F. Supp. 236 (N.D. Ga. 1967), *aff'd*, 399 F.2d 1010 (5th Cir. 1968). Section 92 of the National Bank Act provides an express authorization that a national commercial bank may write insurance where located and doing business in any place with five thousand inhabitants or less. See 12 U.S.C. §92. Nonetheless, the Comptroller's Ruling No. 7110 provided that banks could act as insurance agents for the insurance of insurance "incident to banking transactions". The suing Georgia insurance agents argued that since the National Banking act did not speak of insurance writing in population centers with more than five thousand persons, the ability of banks to engage in such conduct was impliedly prohibited by the Act. *Saxon*, 268 F. Supp. at 236.

69. See *Arnold Tours, Inc. v. Camp*, 286 F. Supp. 779 (D. Mass. 1968), *aff'd*, 408 F.2d 1147 (1st Cir. 1969), *vacated*, 397 U.S. 315, *aff'd on remand*, 428 F.2d 359 (1st Cir. 1970), *rev'd and remanded*, 400 U.S. 45 (1970), 338 F. Supp. 721 (D. Mass. 1972), *aff'd*, 472 F.2d 427 (1st Cir. 1972). As the up and down history of the decision may suggest *Arnold Tours* was a test case in which a direct construction of the incidental powers clause was available. See Dunn, *supra* note 18, at 770 n.78.

70. Courier services were important in the struggle between banks and thrifts for a market share because they became involved in the issue of *de facto* branching. By maintaining deposit receptacles in shopping centers and then transporting money dropped by their own couriers, banks could effectively get around state restrictions on branching to which they were subject. See *First National Bank v. Dickinson*, 400 F.2d 548, 550-52 (5th Cir. 1968), *aff'd*, 396 U.S. 122 (1969).

71. The significance of this service became increasingly important in the computer data processing era that began in earnest in the late sixties and continues to this day. See *National Retailers Corp. v. Valley National Bank*, 411 F. Supp. 308 (D. Ariz. 1976), *aff'd*, 604 F.2d 32 (9th Cir. 1979).

72. See *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); see also the Comptroller ruling at issue, codified at 12 C.F.R. §7.3400 (1976); cf. 12 C.F.R. §7.7376 (1976).

73. See Dunn, *supra* note 18, at 767-70 (excellent general discussion of this era and a comparison of the cases it spawned with cases appearing soon after the passage of the National Bank Act).

74. See *American Bankers Ass'n v. Connell*, 595 F.2d 887 (D.C. Cir.), *cert. denied*, 444 U.S. 920 (1979) (invalidating regulations allowing various new transactions for thrifts and credit unions). *But cf.* The Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978) (codified in various sections of 12, 15, and 42 U.S.C.) (where some important new powers were granted thrifts). See generally Cairns, *supra* note 16, at 724-26; Norton, *supra* note 6, at 1646 n.138; Hayes *Retail Banking in an Interest Sensitive World*, 163 BANKERS MAG. \_\_\_\_ (July-Aug. 1980); HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 95TH CONG., 2D SESS., SURVEY OF BRANCHING POWERS, AND TRUST AND INVESTMENT POWERS OF STATE AND FEDERAL COMMERCIAL BANKS, SAVINGS AND LOAN ASSOCIATIONS, CREDIT UNIONS AND MUTUAL SAVINGS BANKS (Comm. print 1978) [hereinafter referred to as HOUSE SURVEY OF POWERS].

by thrift associations pursuant to state and federal law.<sup>75</sup> Both banks and thrift associations were motivated to strike out and find new market sources in response to the intense competition from non-bank financial intermediaries. Holding companies seemed to provide the answer.<sup>76</sup> In 1956, however, the Bank Holding Company Act (hereinafter referred to as BHC) was enacted and regulation of holding company activities began.<sup>77</sup> The BHC applied only to holding companies owning more than a single bank, so that "one-bank" companies were not regulated.<sup>78</sup> In the 1960's, when the courts were narrowly construing the "incidental powers clause," many banks resorted to one-bank holding companies to subvert the restrictions of the National Bank Act and the BHC.<sup>79</sup> The BHC was amended in 1970, however, to cover one-bank companies as well. Savings and loans also were restricted by the thrift association analog to the BHC,<sup>80</sup> the Savings and Loan Association Holding Company Act.<sup>81</sup>

The late 1960's and early 1970's also signalled a push by depository institutions to avoid geographic restrictions on branching, particularly interstate branching. Electronic fund transfer and Automated Teller Service, as well as the growth of metropolitan areas lapping over state lines, have added to the extreme pressures to remove restrictions on interstate activity.<sup>82</sup>

#### CURRENT TRENDS IN BANKING

"Banking in the Eighties"<sup>83</sup> is characterized by a deregulation of interest rates, an increasing similarity between banks and thrift associations, extended functions for almost all regulated "banking" institutions, intense competition from non-bank intermediaries, and de facto interstate banking.<sup>84</sup> Notwithstanding the local character of the banking system's legal structure, economic and demographic forces have made

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75. See generally Jones, *Bank and Thrift Affiliations: The Current Opportunities*, 100 BANKING L.J. 247, 247-48 (1983).

76. See generally Dunn, *supra* note 18, at 784-92; Jones, *supra* note 75, at 254-56.

77. See *supra* note 1 and accompanying text.

78. *Id.*

79. See Dunn, *supra* note 18, at 785; STAFF REPORT OF THE SUBCOMM. ON DOMESTIC FINANCE, HOUSE COMM. ON BANKING AND CURRENCY, 93D CONG., 1ST SESS., FINANCIAL INSTITUTIONS: REFORM AND THE PUBLIC INTEREST (Comm. Print 1973).

80. Bank Holding Company Act Amendments of 1970, Pub. L. 91-607, 84 Stat. 1760 (amending 12 U.S.C. §§1841-1849).

81. The SHLC is more limited, however, than the BHC is in some respects. See 12 U.S.C. §1730(a). See also Jones, *supra* note 75, at 252-54.

82. See generally, Driskill, *supra* note 3, at 12-13.

83. The phrase was coined by U.S. Representative La Falce. See La Falce, *supra* note 3, at 839.

84. See generally *id.* at 839; Driskill, *supra* note 3, at 313-15; Breeden, *supra* note 1, at 316-19.

the states increasingly powerless to enforce their own policies from a practical perspective. Congress implicitly has recognized the impact of these de facto patterns of banking activity and has responded with national legislation that has caused even more federal encroachment on state prerogatives.

In response to the effect of inflation on the health of depository institutions, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter referred to as the Monetary Act).<sup>85</sup> The Monetary Act has the following two primary functions: authorization of new activities for thrift associations that allow the associations to undertake functions similar to those of commercial banks<sup>86</sup> and pre-emption of state limitations on the rate of interest that borrowers could charge for certain kinds of loans.<sup>87</sup> Both features were designed to make depository institutions more competitive, especially with regard to money market funds. The Monetary Act also established the Depository Institutions Deregulation Committee (hereinafter referred to as DIDC)<sup>88</sup> and charged the committee with the responsibility of issuing regulations and guidelines to ease the process of deregulation.<sup>89</sup> Some of the power of the FRB also was delegated to the DIDC.

The thrift industry provided much of the impetus for passage of the Monetary Act, arguing that the impact of inflation on the intermediation of loan funds put thrift associations in a precarious condition.<sup>90</sup> Savings and loan associations asserted that the differential between the interest rate that they were required to pay to attract depositors and the rate of return on long term real estate loans was destructive of the fundamental financial health of thrift associations, making the associations as vulnerable as they had been during the Depression.<sup>91</sup> State restrictions on lender use of due-on-sale provisions were claimed to exacerbate this effect.<sup>92</sup>

Both savings and loan associations and commercial banks were particularly interested in the freedom from restrictions on interest rates provided by the Monetary Act. The banking industry continued to push for more federal legislation designed to deregulate interest rates

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85. See *supra* note 16 and accompanying text. See generally Norton, *supra* note 6, at 1630; 1980 U.S. CODE CONG & AD. NEWS 236 (for the legislative history of the act); Weaver & O'Malley, *supra* note 16, at 102-06.

86. See generally Raven, *supra* note 4, at 397-400; Norton, *supra* note 6, at 1628-29.

87. See Raven, *supra* note 4, at 397-400; Norton, *supra* note 6, at 1628-29.

88. See DIDC, *supra* note 16, §§3502-3503.

89. *Id.*

90. See generally La Falce, *supra* note 3, at 845-46, 851-52.

91. See *de la Cuesta*, 102 S. Ct. at 3030.

92. *Id.*



further, expand banking functions, and increase the power of regulatory agencies to respond to bank and savings and loan failures. The result was passage of the Garn Act in 1982.<sup>93</sup> Garn goes a long way toward accomplishing the objectives of deregulating rates and functions, yet the Act does not answer key questions concerning interstate branching nor reach the more fundamental issue of whether a unitary federal system should be initiated at this time.<sup>94</sup>

#### THE GARN ACT—A BASIC OUTLINE

The final version of Garn comprises seven acts in seven titles,<sup>95</sup> each affecting different aspects of the banking industry. This article will briefly outline the more important aspects of the Act.

The Deposit Insurance Flexibility Act (Title I)<sup>96</sup> expands the authority of various federal agencies providing insurance on depositor accounts to give assistance to troubled institutions.<sup>97</sup> This part of Garn enlarges the types of financial assistance doled out by these agencies and authorizes merger and acquisition of distressed institutions. In this regard, Garn appears to approve recent FRB orders that allow affiliation of thrift institutions and banks as one solution to the problem of a financially impaired institution.<sup>98</sup> One of these orders was issued prior to final passage of Garn, and concerned the acquisition of Fidelity Federal Savings and Loan Association by Citicorp.<sup>99</sup> Fidelity had been placed in receivership by the FSLIC. Citicorp, a bank holding company, was willing to offer more financial assistance to Fidelity than any other bidder, thus garnering the acquisition. This was the first instance in which the FSLIC as well as the FRB acted on an application that had the practical effect of joining the functions of a savings and loan association with a commercial bank.<sup>100</sup> Aside from fulfilling the immediate objective of providing assistance to troubled institutions, the Act significantly reduces historical restrictions on banking functions, interest rates, and even reserve requirements.<sup>101</sup>

Title III of Garn is denoted as "Thrift Institutions Restructuring Act."<sup>102</sup> An innovative feature of the title is the direction to the DIDC

93. Pub. L. No. 97-320, 96 Stat. 14 (1982) (codified in various sections of 12 U.S.C.); see also La Falce, *supra* note 3, at 842-43; Norton, *supra* note 6, at 1633-35.

94. See Hackley II, *supra* note 23, 1432-34.

95. Pub. L. No. 97-320, 96 Stat. 14 (1982) (codified in various sections of 12 U.S.C.).

96. *Id.*; 12 U.S.C. §§101-142.

97. 12 U.S.C. §101-102; see also Norton, *supra* note 6, at 1630-31.

98. See Jones, *supra* note 74, at 1264-68.

99. *Id.* at 262-64.

100. *Id.*

101. See generally Norton, *supra* note 6, at 1627-28.

102. See the Garn Act, 12 U.S.C. §§301-355.

to create an account competing with money market funds.<sup>103</sup> The DIDC immediately responded with the NOW account, and in December 1982 went on to authorize the "Super-NOW," an entity that resembles a money market account but has the feature of unlimited transactions.<sup>104</sup>

The Garn Act relaxed the lending limitations placed on commercial banks in a variety of ways.<sup>105</sup> Moreover, Garn amended the Federal Reserve Act to define the specific relationship between bank affiliates.<sup>106</sup> Commercial banks lost a significant fight when the form of the Garn Act that was passed included prohibitions on the insurance activities of bank holding companies and their subsidiaries.<sup>107</sup> Nonetheless, the benefits that Garn gives to the banking community outweigh the detriments, particularly because the Garn Act contains a provision requiring DIDC to eliminate interest rate differentials between banks and thrift associations by January 1, 1984.<sup>108</sup>

The combined effect of both the Monetary Act of 1980 and the Garn Act of 1982 has been generally to extend the approved functions of depository institutions (particularly thrift associations),<sup>109</sup> to deregulate interest rates,<sup>110</sup> and to provide needed short term help for troubled institutions.<sup>111</sup> To accomplish these results, some of the most fundamental features of the dual banking system have been significantly eroded. The Garn Act went further than continuing the momentum generated by the Monetary Act to change the structure of banking in America: the Act responded to the due-on-sale clause controversy by pre-empting state law that regulated the clauses and by applying the federal law to state depository institutions as well as to institutions subject to federal regulation.<sup>112</sup> The due-on-sale controversy set-

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103. *Id.* §327.

104. *See* 47 Fed. Reg. 56, 320 (Dec. 16, 1982). Norton believes that the Investment Company Institute will begin a court challenge to the new instruments. Norton, *supra* note 6, at 1634 n.51. The term "NOW" account refers to an account which generates instruments known as negotiable orders of withdrawal. A negotiable order of withdrawal allows the withdrawal of funds from a savings or similar interest bearing account. *See* BRADY, ON CHECKS (4th ed. Bailey) §1.17 & n.1. These instruments physically resemble and function similarly to regular checks. They contain blank spaces for the indication of the payee and the signature of the withdrawing depositor and are third party instruments. *Id.* Such instruments differ from checks, however, in that they are payable through a named bank were the savings and loan institution has its own commercial account. *Id.* Unresolved questions exist concerning whether NOW instruments are truly negotiable and whether they are checks in fact. *Id.*

105. *See* Norton, *supra* note 6, at 1635-37.

106. *See* the Garn Act, 12 U.S.C. §410 (amending the Federal Reserve Act, 12 U.S.C. §371c).

107. *Id.* §§426-427.

108. *Id.* §326.

109. *See* Norton, *supra* note 6, at 1627-28.

110. *Id.*

111. *Id.*; *see also* La Falce, *supra* note 3, at 839-43.

112. *See* the Garn Act, 12 U.S.C. §341.

tled by Garn had been brewing since individual states began to restrict lender exercise of loan acceleration provisions for economic reasons.<sup>113</sup>

### THE DUE-ON-SALE CONTROVERSY

California limits lender use of due-on-sale<sup>114</sup> provisions through the landmark case of *Wellenkamp v. Bank of America*.<sup>115</sup> *Wellenkamp* was the logical result of a line of precursive decisions gradually narrowing the circumstances within which a lender could resort to the due-on-sale clause in a lending instrument as a device to retire long term loans made at an unprofitable rate or to force an increase in interest rates.<sup>116</sup> In that case, the California Supreme Court held that the lender must demonstrate that the transfer of property will impair its security before the provision can be activated.<sup>117</sup> For the court, "impairment of security" could normally be demonstrated only by proof of a transfer likely to increase the risk of physical wastage to the property or actual depreciation in its fair market value.<sup>118</sup> The practical result of *Wellenkamp* was to curtail the increasing practice of lenders to use the due-on-sale provision to eliminate old loans made at low rates. A number of other states follow a similar policy, either by legislative enactment or judicial decision.<sup>119</sup>

Thrift associations were more adversely affected by state restrictions on due-on-sale clauses than were commercial banks.<sup>120</sup> Banks, at least until recently, had a broader range of banking functions and

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113. See, e.g., *de la Cuesta*, 102 S.Ct. at \_\_\_\_; Mitchell-Lockyer, *supra* note 1, at 20-22; *cf* Conference of Federal Savings & Loan Associations v. Stein, 604 F.2d 1256 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980).

114. The due-on-sale clause is a provision allowing acceleration of the outstanding balance due on a loan on transfer of the real property or a related transaction. The Garn Act defines the clause as:

[A] contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent. . . .

12 U.S.C. §341(a)(1).

115. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

116. See generally *Coast Bank v. Minderhout*, 61 Cal. 2d 312, 392 P.2d 265, 38 Cal. Rptr. 505 (1964) (concluded restraint was reasonable); *La Sala v. American Sav. & Loan Ass'n*, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971) (precluded enforcement unless the lender could show that enforcement was reasonably necessary to protect its security); *Tucker v. Lassen Sav. & Loan Ass'n*, 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 663 (1974) (required a significant showing that enforcement was necessary); see also Mitchell-Lockyer, *supra* note 1, at 1 n.1, 2.

117. *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 943-53, 582 P.2d 970, 976-77, 148 Cal. Rptr. 379, 384-85 (1978).

118. *Id.*

119. See Mitchell-Lockyer, *supra* note 1, at 3 n.10.

120. *Id.* at 14-20.

were therefore less sensitive to the impact of inflation on the housing market. As a result, the federal agency responsible for thrift associations responded aggressively to protect federal savings and loans at the expense of conflicting state policy.

In 1976, the FHLBB issued regulations authorizing federal thrift associations to include due-on-sale provisions in their lending agreements.<sup>121</sup> The regulation was permissive by its literal terms although the preamble declared that the intent of the FHLBB is creating the rule was to pre-empt conflicting state law affecting federal entities.<sup>122</sup> The FHLBB regulations inevitably clashed with state policy in jurisdictions like California where due-on-sale restrictions continued to be developed and were applied to loans made by federal institutions.<sup>123</sup> The power of the regulation to pre-empt state law, at least with regard to federal lenders, was decided by the United States Supreme Court in *Fidelity Federal Savings and Loan Association v. Reginald de la Cuesta*.<sup>124</sup> In that case, the Court held that the FHLBB regulation expressed what had always been implicit in the very structure of the federal system of savings and loan associations: the FHLBB was delegated broad power to effectuate HOLA and valid regulations which served that purpose so carried pre-emptive force when they conflicted with state law.<sup>125</sup>

*De la Cuesta* provided the constitutional underpinning for the pending Garn Act, and a little more than six months after the decision appeared, the Act was passed by Congress. Garn goes far beyond the factual context of *de la Cuesta*, however, because the Act pre-empts state policy on due-on-sales for lenders with no federal aspect. Section 341 of the Act provides:

(b)(1) Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any state to the contrary, a lender may, subject to subsection (c), enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.<sup>126</sup>

Subdivision (c) of section 341 goes on to establish a window period for pre-Garn loans. For a limited category of loans made before the Act was passed, the window period delays the pre-emptive effect of the due-on-sale provisions until three years after the date of their

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121. The regulation originally appeared in 12 C.F.R. §546.6-11(f). See 44 Fed. Reg. 39, 108, 39, 149 (1976).

122. *Id.*

123. See, e.g., *Dawn Investment Co. v. Superior Ct.*, 30 Cal. 3d 695, 639 P.2d 979, 180 Cal. Rptr. 332 (1982); see also *de la Cuesta*, 102 S.Ct. at 3023-24.

124. See *de la Cuesta*, 102 S.Ct. at 3025.

125. The Garn Act, 12 U.S.C. §341(b)(1).

126. *Id.* §341(c)(1).

enactment (October 15, 1982).<sup>127</sup> For window loans, only transfer activity occurring after the three year period will be regulated by federal law. Moreover, Garn allows the state legislature to act within the three year period to "otherwise regulate" contracts made by state lenders, so that the states may legislatively throw off the federal mandate.<sup>128</sup>

Notwithstanding the federal pre-emptive scheme in Garn, the Act contains some significant restrictions on the lender's right to enforce the due-on-sale clauses. In the following types of transactions, the lender is prohibited from resorting to the provision: (1) creation of subordinate liens or encumbrances that do not relate to the transfer of a right of occupancy, (2) creation of purchase money security interests for household appliances, (3) certain transfers occurring on the death of a joint tenant or tenant by the entirety, (4) transfer to a relative on death of the borrower, (5) granting of a leasehold of three years or less without an option to purchase, (6) transfers to a spouse or children of the borrower, (7) transfers related to dissolution or divorce, and (8) transfers pursuant to *inter vivos* trusts under certain restrictions.<sup>129</sup> The provisions of Garn outlined above are deceptively simple. The short history of the due-on-sale controversy since the passage of the Act has demonstrated that there is a latent ambiguity in many of the provisions.<sup>130</sup> This ambiguity has become important as the states have struggled to implement Garn in the most painless fashion possible, with an aggressive federal agency, the FHLBB, snapping at their heels.

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127. The Garn Act provides in pertinent part:

In the case of a contract involving a real property loan which was made or assumed . . . during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such State has rendered a decision (or, if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision. . . ) prohibiting such exercise, and ending on the date of enactment of this section, the provision of subsection (b) shall apply only in the case of a transfer which occurs on or after the expiration of 3 years after the date of the enactment of this Act, except that—

(A) a State, by a State law enacted by the State legislature prior to the close of such 3-year period, with respect to real property loans originated in the state by lenders other than by national banks, Federal savings and loan associates, Federal savings banks, and Federal credit unions, may otherwise regulate such contracts, in which case subsection (b) shall apply only if such State law provides. . . .

12 U.S.C. §341(c)(1).

128. *Id.* §341(c)(1)(A).

129. *Id.*

130. See Preamble to S.B. 494, 1983-84 Regular Session; California Realtors Association, Comments on Proposed Rule, Preemption of State Due-On-Sales Law (a position paper submitted to the FHLBB on March 17, 1983) [hereinafter referred to as Comments] (copy on file at the *Pacific Law Journal*). Compare *id.* with 12 U.S.C. §341(c)(1)(A) (for the interpretative issues raised concerning whether a loan that originated *both* prior to a state restriction on due-on-sales *and* prior to Garn, is entitled to any protection).

Issues that have sparked debate include the definition of the beginning point of the window period,<sup>131</sup> the unrestricted right of states to interpret the Garn definition,<sup>132</sup> and the status of pre-Garn loans that are also pre-window.<sup>133</sup> Moreover, application of the Garn exceptions themselves has proved to be a great source of controversy. The most disputed issue seems to be whether commercial borrowers will be entitled to the benefit of the exceptions.<sup>134</sup> Additionally, Garn left open the question of whether lenders may extract pre-payment penalties when accelerating loans through due-on-sales.<sup>135</sup> Perhaps most importantly, the right of states to regulate lender behavior in the due-on-sale acceleration process in any manner now is open to doubt.<sup>136</sup>

By its terms, Garn delegated to the FHLBB the right and responsibility to promulgate rules, regulations, and interpretative guidelines to effectuate the due-on-sale provisions of the Act.<sup>137</sup> The FHLBB issued its first regulation set in response on April 26, 1983.<sup>138</sup> The regulations have proved controversial and their impact on pending legislation in California has been dramatic.

#### SENATE BILL 494

During the same period when the FHLBB was considering the substance of rules and regulations to be issued pursuant to the Garn Act, legislation was introduced in California that focused on many of the ambiguities in the due-on-sale provision of the Act. In February of 1983, California State Senator Barry Keene introduced Senate Bill 494, a measure sponsored by the California Realtors Association (hereinafter referred to as the Realtors) to make California law "consistent" with Garn.<sup>139</sup> Senate Bill 494 (hereinafter referred to as S.B. 494) was designed to accomplish several goals. First, the bill was to define the window period for California with more specificity, making the period coincide with the rendition of the *Wellenkamp* decision.<sup>140</sup> Second, the bill purported to prohibit automatic acceleration for loans in a

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131. See Supplementary Information 4-8, 9-10 to FHLBB final rules, Preemption of State Due-On-Sales Law, 12 C.F.R. Parts 545, 556, 590, and 591, 48 Fed. Reg. No. 100 (Part II) (1983) [hereinafter referred to as, Supplementary Information]; see also 12 C.F.R. §591.2(p).

132. See *Comments, supra* note 130, at 8-11; see also Supplementary Information, *supra* note 131, at 5.

133. See *Comments, supra* note 130, at 12-13.

134. *Id.* at 2-8.

135. The Garn Act is silent on the question. See 12 U.S.C. §341.

136. See 12 C.F.R. §591.5; see also *Comments, supra* note 130, at 14-15.

137. 12 U.S.C. §341(3)(1).

138. 48 Fed. Reg. no. 100, (Part I) (1983).

139. S.B. 494, 1983-84 Regular Session.

140. *Id.*

transaction "by which the property is sold or transferred" if the transaction occurred before October 15, 1982.<sup>141</sup> The effect of this provision seems to be to inhibit acceleration of all pre-Garn loans, not just window loans.

S.B. 494 would have effectuated these changes by adding a new section 711.1 to the California Civil Code.<sup>142</sup> In *Wellenkamp*, the California Supreme Court had construed section 711 to limit lender exercise of the due-on-sale clause.<sup>143</sup> Moreover, the bill would have amended section 2924.6 of the California Civil Code specifically to engraft the Garn exception into California law.<sup>144</sup> In the statement of purpose and findings supporting the legislation, proposed S.B. 494 asserted that the application of the Garn Act was ambiguous and that the states needed to enact particular legislation to remove those ambiguities.<sup>145</sup> The bill declared that the state of California would be acting positively on provisions contained in the Garn Act and that the legislature would be ". . . acting within the express and implied authority delegated to the states by the Garn Act and pursuant to the Tenth Amendment to the Constitution of the United States. . . ."<sup>146</sup>

Even the limited territory staked out by S.B. 494 in its original version could not survive the regulations promulgated by the FHLBB. On May 9, 1983, only a few weeks after the appearance of the regulations, the bill was amended and reformulated into a simple provision prohibiting pre-payment penalties extracted by lenders in the context of due-on-sale.<sup>147</sup> The FHLBB regulations impliedly conflict with S.B. 494 as it was originally introduced in a number of ways. Moreover, when compared to the delegation of Congressional power effectuated by Garn, the regulations very well may exceed the limits of that power.

At the same time, that the Realtors were seeking passage of S.B. 494 in the state legislative arena, they also were fighting specific provisions of the rules proposed by the FHLBB to effectuate the due-on-sale provisions of the Garn Act. A document entitled, "Comments on Proposed Rule, Pre-emption of State Due-on-Sale Laws"<sup>148</sup> (hereinafter referred to as Comments) filed by the Realtors in conjunction with

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141. *Id.*

142. *Id.* (and the preamble thereto).

143. *Wellenkamp*, 21 Cal. 3d at 950, 582 P.2d at 974, 148 Cal. Rptr. at 383.

144. S.B. 494, 1983-84 Regular Session.

145. *Id.*

146. *Id.*

147. *Id.* (in its form as amended in the Senate on May 9, 1983).

148. See *supra* note 129 and accompanying text.

testimony presented in public hearings on the proposed rules contain the objections to specific provisions.<sup>149</sup> As part of the "Supplementary Information"<sup>150</sup> accompanying the proposed rule, the FHLBB reserved the right to issue interpretations defining the window period in the various states.<sup>151</sup> The Realtors objected, asserting that the legislative history of Garn indicated a congressional intent to give that right to the states.<sup>152</sup> The Comments also questioned the FHLBB position that state override of Garn on loans during window periods could not be accomplished by initiative or referendum.<sup>153</sup> Finally, the FHLBB regulations apparently restrict the protections of pre-Garn loans from lender accelerations to window period loans as well.<sup>154</sup> Thus, the FHLBB rules resolve that ambiguity in the statute in favor of the lender.

The FHLBB interpretation of the meaning of requiring transferees on protected loans to meet "customary credit standards" was also a point of controversy.<sup>155</sup> The Board inserted a requirement that the customary credit standards must be determined by the "lender."<sup>156</sup> The Realtors objected, arguing in the Comments that this language could destroy any protections against lender acceleration.<sup>157</sup>

The major point of controversy became the meaning of the Garn exceptions to due-on-sale acceleration for certain types of transactions and the power of states to tailor those exceptions.<sup>158</sup> First, the FHLBB rule had the effect of prohibiting commercial lenders from taking advantage of the Garn exceptions for specific types of transactions by restricting the exceptions to loans that are "on the security of a home occupied or to be occupied by borrower."<sup>159</sup> In the Comments, the Realtors argued that the variation among states as to whether commercial lenders should be protected by restrictions on due-on-sales should not be disturbed by Garn.<sup>160</sup> Because the case

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149. *Id.* In the Comments, the Realtors objected to a variety of aspects of the proposed FHLBB rules including (1) the status of commercial borrowers, (2) issues relating to the "window period", (3) the meaning and application of the customary credit" requirement for window loans, and (4) the extent of state power to regulate the manner of lender acceleration in the context of due-on-sales. Comments, *supra* note 130, 2-8, 10-15.

150. See *supra* note 130 and accompanying text.

151. Comments, *supra* note 130, at 8.

152. *Id.*

153. *Id.* at 9.

154. *Id.* at 12-13.

155. *Id.* at 10-12; see also 12 U.S.C. §341(c)(2)(A).

156. See Supplementary Information, *supra* note 131, at 13-14.

157. See Comments, *supra* note 130, at 10-12.

158. See *id.* at 2-7.

159. 12 C.F.R. §591.5(b); see also §291.5(b)(1)(i)-(vi); Comments, *supra* note 130, at 6-7.

160. Comments, *supra* note 130, at 4.



of *Dawn Investment Co. v. Superior Court* extended the *Wellenkamp* rationale to commercial loans and even to private lenders in California,<sup>161</sup> the Realtors argued that the Garn exceptions should apply to non-consumer borrowers.<sup>162</sup> Perhaps the most important objection for the long term made in the Comments dealt with the power of the states, after Garn, to regulate in any manner lender conduct in the context of due-on-sale clauses. The FHLBB rules provide that:

. . . the practices of Federal associations and other lenders shall be governed exclusively by the Board's Regulations, in pre-emption of and without regard to any limitations imposed by states on either their inclusion or exercise, including without limitation, state law prohibitions against restraints on alienation, prohibitions against forfeitures, equitable restrictions, and state law dealing with equitable transfer.<sup>163</sup>

The apparent ouster of the states from the whole area of due-on-sale clause acceleration raises a number of important questions. For example, may a state court entertain arguments of a borrower that a particular lender is estopped from relying on an acceleration provision due to the facts of the particular transaction? Would the doctrine of unconscionability be available in an individual case? Could the courts of California extend the theory of "reasonable expectations" to an adhesion contract providing for an obligation due-on-sale? The FHLBB rule is unclear on whether the prohibition against equitable principles applies only to the sort that are used to create substantive rights for broad classes of persons and are applied to all lenders across the board (as in *Wellenkamp*), or whether the ability to give equitable relief in an individual case on particular facts is impaired.

A potential conflict exists between the right of states to legislate in the area of home foreclosures and the power of the agency to regulate foreclosures. The Realtors have pointed out that California Civil Code section 2924.5 currently provides that a condition to enforceability of a due-on-sale clause is that it appear in both the note and security agreement of the transaction.<sup>164</sup> Has this requirement been impliedly pre-empted by the agency regulation? If not, how far could a state go in regulating the form of a contract containing an accelera-

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161. *Dawn Investment Co.*, 30 Cal. 3d at 702-04, 639 P.2d at 978-79, 180 Cal. Rptr. at 335-37.

162. Comments, *supra* note 130, at 4.

163. 12 C.F.R. §§591.4(b), 591.5. The exception stated in section 591.5, deals with the operation of the window period for loans originated by other federal associations. See 12 C.F.R. §591(4)(b).

164. CAL. CIV. CODE §2924.5.

tion for transfer provision or impose other time, place, and manner restrictions on resort to the clause?

Comments in the Senate Report to Garn indicate that the intent was to leave "state laws with respect to property rights, state securities laws or state foreclosure laws" intact.<sup>165</sup> The bold assertion of dominance by the FHLBB in the whole area will be the source of litigation as states legislatively or judicially attempt to test the meaning and boundaries of the agency rule.

S.B. 494, in original form, might have provided the impetus for testing the boundaries of the Garn Act. The bill was conceived to follow through with Garn and to make interaction between federal law and remaining state authority clear and smooth.<sup>166</sup> Because the original bill purported only to do what the Garn Act explicitly or impliedly authorized, S.B. 494 could have been used to force a determination of the relation of the FHLBB rules to the actual delegation of congressional power.<sup>167</sup> This was not to be. With the appearance of the FHLBB's regulations, the Realtors turned their focus away from the main points of the Garn pre-emptive provisions and concentrated on the one area that the federal regulations did leave to state control—the issue of pre-payment penalties on acceleration via the due-on-sale clause.

Proposed FHLBB rule section 591.5(b)(2) would have imposed a federal prohibition on lender charges for pre-payment penalties when used in conjunction with the due-on-sale provision.<sup>168</sup> The ban did not end up in the final form of the rules except in a limited sense for a certain class of loans made after 1976 and before the final promulgation of the regulations.<sup>169</sup> Instead, the FHLBB determined that the matter of pre-payment on acceleration in the context of due-on-sales should be left to the states.<sup>170</sup>

On May 9, 1983, S.B. 494 was amended and transformed from a bill designed to implement Garn in California to a bill directed to the issue of pre-payment.<sup>171</sup> The amended form of the bill purported

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165. Senate Report page 25.

166. S.B. 494, 1983-84 Regular Session.

167. Agency regulations only have preemptive force if they are validly made and coincide with the grant of Congressional authority. *See United States v. Shimer*, 367 U.S. 374, 381-82 (1961). But, where the exertion of agency power is rationally related to the Congressional grant or scheme, the agency will not have exceeded its authority. *See Free v. Bland*, 369 U.S. 663, 668 (1962). *See generally de la Cuesta*, 102 S.Ct. 3014, 3022-23 (1982).

168. Supplementary Information, *supra* note 131, at 16-17; *see also*, Comments, *supra* note 130, at 15-16.

169. *See*, Supplementary Information, *supra* note 131, at 16-17.

170. *Id.*

171. S.B. 494, 1983-84 Regular Session.

to add new section 2954.10 to the California Civil Code and provided for a blanket prohibition on acceleration without regard to the nature of the underlying transaction or the status of the borrower:

2954.10. An obligee which accelerates the maturity date of the principal and accrued interest, pursuant to contract on any loan secured by a mortgage or deed of trust on real property, upon the conveyance of any right, title, or interest in that property, may not claim, exact, or collect any charge, fee, or penalty for any pre-payment resulting from acceleration.<sup>172</sup>

Even this version was opposed by aspects of the banking industry in California who wanted to limit the scope of the bill even further.<sup>173</sup> Accordingly, the bill was amended again and the final version reflects a "settlement agreement" between the California League of Savings Institutions, the California Bankers Association, and the Realtors.<sup>174</sup> S.B. 494, as finally passed by the California Legislature, prohibits lenders from insisting on pre-payment penalties when they have accelerated the borrower's obligation by use of the due-on-sale provisions, but commercial borrowers may waive or agree to forego the protection of the prohibition on certain conditions.<sup>175</sup>

#### CONCLUSION

Today, the position of the Realtors in regard to the issue of due-on-sales is dramatically different than it was even two or three years ago when the *Wellenkamp* decision had given the Realtors a practical advantage in the legislative arena. The purpose of this article is to describe the shift in power as exemplified by the history and the events surrounding passage of SB. 494 and to illustrate the capacity of the market forces in the banking industry to sweep aside legitimate state concerns, even in areas traditionally reserved to the states. The whole saga of the due-on-sale controversy, from the state judicial and legislative expressions creating the conflict through *de la Cuesta* to Garn and now their aftermath is just one harbinger of the federal unitary system of banking that may be established in the next decade, if not sooner.

De facto patterns in the banking industry have always been critically important to the creation and interpretation of the legal basis of its

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172. *Id.*

173. California Bankers Association, statement of Opposition to S.B. 494, 1983-84 Regular Session (copy on file at the *Pacific Law Journal*) (as amended) 1-2.

174. Information provided by Senator Barry Keene's office, September 10, 1983 reflected in the bill file to S.B. 494.

175. S.B. 494, 1983-84 Regular Session (in its final form as passed on September 13, 1983).

structure. From the time of the Revolution when the existence of the National bank depended on the vagaries of politics and foreign policy, through the Civil War, when the apparatus of the current system was born, through the Depression and now the technological revolution, actual patterns in the delivery of financial services as determined by economic, demographic, and political forces have always affected the form of the banking system *de jure*. Perhaps the response to consumers and realtors in California can best be understood by an analogy to the proverbial salmon swimming upstream. At this point, and for the foreseeable future at least, the river is in a flood stage about to overflow its banks. The power of an individual state or interest group depending on state control to swim upstream against the current is limited, if not non-existent.

